ADMINISTRATIVE EXERCISE OF THE POLICE POWER.

[*Concluded.*]

III.

Judicial Review in Actions for Damages.

WHENEVER administrative action in the exercise of the police power takes the form of the issue of an order to an individual, he may by prompt petition to the courts secure a judicial ruling as to the validity of the administrative command. The same possibility of relief is open to him when he complains that the administration denies him permission to take some action for which its consent is necessary under the law. But other methods of administrative procedure may be so summary that an action for damages affords the only possible means of relief. And wherever loss has actually accrued through administrative action, money compensation is essential to complete redress for any official wrong.

A. *Liability of Public Corporations.*

(1) *The State.* — No action can be maintained against the state without its consent. Even where a statute creates a court of claims with jurisdiction over demands against the state, it is held that the state is not made a debtor by the unauthorized acts of officers in destroying what is not in fact a nuisance.[1] In a case where the court declined to interfere with commissioners in appraising the value of diseased cattle killed, to determine the compensation due from the state under the statute, it was declared that if healthy cattle were killed, the state was not responsible.[2]

(2) *Municipalities.* — Municipal corporations are not immune from the process of the courts; but, by the great weight of authority, no action lies against a municipality for the wrongful acts of

[1] Houston *v.* The State, 98 Wis. 481 (1898).

[2] Shipman *v.* State Live Stock Commission, 115 Mich. 488 (1898).

its officers in executing police ordinances.[3] The decisions are based upon the grounds that the police officers, though chosen by the city, are not servants of the municipality, but general officers,[4] and also that the city is exercising the police power, not for its benefit or interest in its corporate capacity, but for the public good.[5] No liability can be enforced for mere wrongful refusal to issue a license,[6] or wrongful revocation of a license.[7] But in some jurisdictions municipalities are held liable for the positive trespasses of their officers in enforcing police measures.[8] Such liability is sometimes imposed directly by statute. The question whether property destroyed was in fact a nuisance presents itself for judicial cognizance also in suits under statutes making a city or county liable for damages done by mobs.[9]

B. *Liability of Officers.*

(1) *Denial of Permission.* — No action can be maintained against an officer personally for his failure to take action in enforcing the police power,[10] or for his refusal to extend permission to do some act for which a license is required. In an early New York decision, where action was brought against an inspector-general of provisions

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[3] Hand *v.* Philadelphia, 8 Pa. Co. Ct. Rep. 213 (1890), city held not liable for act of health officer in removing to a pest-house a person not in fact infected with small-pox. Plaintiff had already recovered damages from the officer personally; but the case does not appear to have been appealed to a higher court. Evans *v.* City of Kankakee, 231 Ill. 223 (1907), city not liable for negligent fumigation of city calaboose by its officers.

[4] Beeks *v.* Dickinson County, 131 Iowa 244 (1906); Valentine *v.* Englewood, 76 N. J. L. 509 (1908).

[5] Boehm & Loeber *v.* Baltimore, 61 Md. 259 (1884); Gilboy *v.* City of Detroit, 115 Mich. 121 (1897).

[6] Butler *v.* City of Moberly, 131 Mo. App. 172 (1908).

[7] Claussen *v.* City of Luverne, 103 Minn. 491 (1908).

[8] Mayor *v.* Mitchell, 79 Ga. 807 (1887). In Faucheux *v.* Town of St. Martinville, 45 So. 600 (La. 1908), it was held error to dismiss action against town for destruction of plaintiff's house by order of the corporation and mayor, because the town is *primâ-facie* liable and has the burden to prove that the acts of its agents are wholly *ultra vires*. *Cf.* Sumner *v.* Philadelphia, Fed. Cas. 13, 611 (1873), where city was held liable for wrongful detention of vessel for quarantine.

[9] Ely *v.* Board of Supervisors, 36 N. Y. 297 (1867); Brightman *v.* Bristol, 65 Me. 426 (1876).

[10] Whidden *v.* Cheever, 44 Atl. 908 (N. H. 1897), not liable to landlord for refusal to order small-pox tenant transferred to a pest-house.

for condemning certain beef as unmerchantable, Judge Livingston declared that

"an officer, acting under a commission from government, who is enjoined by law to the performance of certain things, *if in his judgment or opinion* the requisites therein mentioned have been complied with, . . . is not answerable to a party, who may conceive himself aggrieved for an omission arising from mistake or mere want of skill." [11]

And a half century later the California court, in holding that the power of the board of pilot commissioners was quasi-judicial and that they were not civilly answerable for denying a license, announced that "whenever, from the necessity of the case, the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he be protected from the consequences of an erroneous judgment." [12] But an officer may be held responsible for libel or slander in connection with his disapproval of goods inspected.[13]

Actions for damages, however, are usually based not on non-feasance, but on some positive action which results in actual interference with person or property. But the personal liability of those who exercise governmental authority does not follow of necessity from the fact that in other proceedings their action might be modified or annulled by the courts. A legislator may vote for an unconstitutional statute, an inferior judicial officer may issue a decree which a higher court will later reverse, and yet neither be responsible in damages to individuals aggrieved.

(2) *General Regulations.* — The issue of general regulations by an administrative body is so akin to the exercise of legislative power, that those who issue the regulation are not personally responsible merely for having cast their vote.[14] Few would venture to exercise the discretion vested, at the risk of being called upon to justify their action in a thousand suits for damages.

But the immunity given to those who issue the regulation does not leave the individual without remedy. A regulation which the

[11] Seaman *v.* Patten, 2 Caines N. Y. Term Rep. 312 (1805).
[12] Downer *v.* Lent, 6 Cal. 94 (1856).
[13] Hubbard *v.* Alleyn, 200 Mass. 166 (1908).
[14] Jones *v.* Loving, 55 Miss. 109 (1877); Baker *v.* State, 27 Ind. 485 (1867), *semble.*

courts deem improper furnishes no protection to inferior officials who execute it.[15]

(3) *Special Orders and Adjudications.* — Where the administrative order relates to an individual instance, the function performed is similar to that commonly entrusted to the courts. For every special order, whether based on conditions peculiar to the individual instance or common to the general class to which it belongs, involves the determination that the concrete case falls within some general rule.

Shall the officers who exercise this power receive the immunity accorded to the judiciary?

The rule in favor of judicial officers is deemed necessary to protect them in the impartial performance of their duties, that they may render the decision they deem just and necessary, without fear of the consequences. It is urged that the same considerations apply to administrative officers in the exercise of what are often termed quasi-judicial functions.

In dismissing a suit against a meat inspector for the destruction of fish which the plaintiff alleged were not in fact unwholesome, the court said that the

"powers conferred are plainly and clearly judicial. . . . The officer exercising such a power is within the protection of that principle, that a judicial officer is not responsible in an action for damages to any one for any judgment he may render, however erroneously, negligently, ignorantly, corruptly, or maliciously he may act in rendering it, if he act within his jurisdiction." [16]

In a similar case against an officer for killing a horse which the lower court had found was not in fact afflicted with glanders, Judge Devens declared that the decision of the officer should nevertheless "be held conclusive, in order that the community may be protected, and that those entrusted with the execution of the law may safely assume the responsibilities imposed upon them." [17]

But this was in a dissenting opinion. And the former case has been overruled.[18] So that the broad doctrine enunciated is not law.

[15] Little *v.* Barreme, 3 Cranch (U. S.) 170 (1804); Tracy *v.* Swartwout, 10 Pet. (U. S.) 80 (1836).

[16] Fath *v.* Koeppel, 72 Wis. 289 (1888).

[17] Miller *v.* Horton, 152 Mass. 540 (1891), *infra*, p. 448.

[18] Lowe *v.* Conroy, 120 Wis. 151 (1904).

In considering the liability of officers for the execution of their own decrees, a distinction is to be noted between two methods of administrative enforcement. It may be direct and immediate, without notice to persons affected, or else conditioned on non-compliance by the individual with some order specifically brought to his attention. In the former case, an action for damages affords the only access to the courts; in the latter, upon receipt of the order, a bill may be filed to restrain its execution. A denial of the injunction after a hearing settles the question of the characteristics of the property, and the doctrine of *res adjudicata* prevents the owner from offering evidence as to its condition in an action for damages against the officer.[19]

Where the owner neglects either to comply with the order or to file a bill to enjoin its enforcement, there are cases which on their facts sustain the proposition that in a subsequent action for damages, he cannot question the correctness of the administrative finding of fact on which the order and its execution are based. In Van Wormer *v.* The Mayor [20] the board of health tore down the house of the plaintiff after he had disregarded their order of removal. In the subsequent suit for damages it was held that evidence to show that there was in fact no nuisance was properly rejected, as that point "had been adjudicated by the proper tribunal, and was not in issue at the circuit." In Raymond *v.* Fish [21] the owner failed to remove certain brush as ordered, and it was destroyed by the board. Judgment was given in their favor, although the trial court had found expressly that the property destroyed was not the origin or a producing cause of disease.

There is thus authority which tends to establish that where administrative execution is merely a substitute for action required of the owner, a suit for damages against those who issue the order is not the proper proceeding in which to question the existence of the facts on which it is based. These decisions were based on broader grounds than that the plaintiff was barred by his failure to seek judicial relief in the interim between the receipt of the order and the invasion of his property.[22] But we may question

[19] Wheeler *et al. v.* City of Aberdeen *et al.*, 87 Pac. 1061 (Wash. 1906). But it was held error to dismiss the action, since it was open to the plaintiffs to show that the defendants had acted wantonly and beyond the necessities of the situation.

[20] 15 Wend. (N. Y.) 262 (1836).

[21] 51 Conn. 80 (1883).

[22] See *infra*, p. 451.

the broader principles enunciated, and yet sustain the decrees on the doctrine suggested. For it would seem a salutary rule which requires the owner to seek the aid of the courts before the mischief is done, and while the property is still in existence as a source of evidence, or else to be bound by the administrative determination. This affords to the officer the protection essential to efficient execution of the law, and withholds judicial relief from the owner only by reason of his prior laches.

Some have sought to sustain Raymond *v.* Fish and Van Wormer *v.* The Mayor, not on the ground that there was opportunity for a judicial hearing at some prior time, but on the theory that the owner's rights were adequately protected because he had been accorded a hearing before the administration.[23] In Van Wormer *v.* The Mayor the court seems to assume that under the statute a hearing was necessary, and finds that the statute had been substantially though not technically complied with. But in Raymond *v.* Fish no hearing seems to be necessary from such portions of the statute as are quoted in the opinion; and no mention of such necessity appears in the discussion of the court. And from the statement of facts it appeared that no hearing had been accorded as to the issue of the particular order of whose enforcement the plaintiff complained.[24] But the granting of a hearing before the issue of the order would seem to be immaterial, if the basis for denying judicial review in the action for damages is the prior opportunity to be heard in judicial proceedings before the order is carried into effect.

(4) *Administrative Execution.* — Such opportunity is of course foreclosed by execution not preceded by notice to the owner to take action himself. The question in such cases is squarely presented: is a judicial hearing necessary? No such requirement exists in respect to the accuracy of administrative ascertainments of value for purposes of taxation. Assessors are accorded the same immunity enjoyed by judicial officers. But in considering the analogy between judicial and administrative action, it is to be noted that in judicial proceedings due process inexorably requires notice and an opportunity to be heard. These are also prerequisite to the findings of assessors. But in the exercise of the police power,

[23] See *infra*, p. 451 *et seq.*

[24] See *infra*, p. 452.

notice and a hearing before the administration are often not essential. In such instances the analogy fails.

(a) *In absence of opportunity to be heard.* — The law is clear, therefore, that when a hearing has been impossible before either the administration or the courts, the officer who has destroyed property must establish in the suit for damages that it possessed the characteristics which he claims to have found, and that its condition justified his action.[25]

In Lowe *v.* Conroy[26] the Wisconsin court conceded the general principle announced previously in Fath *v.* Koeppel,[27] but added:

"The facts show that the respondent's private property rights have been unjustly invaded and that he is remediless in law unless those who did the trespass are liable. Under such circumstances the rule applies that even quasi-judicial officers may be subject to a personal liability, since the discretion in which such officers are protected must be limited to the line where their acts invade the private property rights of another, for which the law affords no redress other than an action against the one actually committing the trespass."

In Pearson *v.* Zehr[28] the court received the evidence of farmers and others not veterinarians, and sustained a judgment against members of the Board of Live Stock Commissioners for killing horses which the jury found did not in fact have glanders, saying that unless the fact of glanders exists, the slaughter is done without authority of law, although the board acted in good faith, had reasonable grounds for their belief, and had made an honest and careful investigation.

Thus it would seem that the opinions of experts may be outweighed by the conclusions of the untrained, and that those who endeavor honestly and carefully to perform the duties entrusted to them by law to protect the community against danger may be subject to the findings of a jury with respect to matters frequently arousing popular passion and prejudice hostile to the enforcement of the law.[29]

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[25] North American Cold Storage Co. *v.* Chicago, *infra*, p. 449; Miller *v.* Horton, *infra*, p. 448.

[26] 120 Wis. 151 (1904). [27] *Supra*, p. 444. [28] 138 Ill. 48 (1891).

[29] The hardships of such a rule and the consequent danger of lax and ineffective administration are mitigated in many jurisdictions by statutes placing on the public treasury the burden of the expense, in some instances even where the property destroyed is admittedly noxious.

The cases are based on two grounds: the limited jurisdiction vested in the administration; and the impossibility of interfering with property unless the owner has somehow, somewhere, the opportunity to offer evidence as to its condition.

The rule is universal that officers are personally liable for acts in excess of jurisdiction. The difficulty lies in ascertaining the jurisdictionary fact: fish, or unwholesome fish; horses, or horses with glanders. The cases have arisen in the absence of express statutory provision that the finding of the board should be conclusive. In Pearson *v.* Zehr the court declared that unless the fact of glanders exists, the slaughter is done without authority of law. In Miller *v.* Horton[30] the majority held that the statute gave no authority unless the horse in fact had glanders; and they proceeded on the not unusual assumption that the fact is necessarily what is determined to be true in judicial proceedings. The minority, on the other hand, were of opinion that the intention of the legislature was that the right of any agent the commissioners might employ should rest, not on the fact that the animal was actually affected with glanders, but on the administrative finding and condemnation.

This interpretation raises the question of constitutionality. The minority urged that the legislature might consider that self-protection required the immediate killing of all horses which a competent board deemed infected, whether they were so or not, and that innocent horses killed as a sacrifice to necessary self-protection need not be paid for. Judge Holmes answered vaguely enough that self-protection requires only what is actually necessary, and not all that may reasonably be believed to be necessary. But he added that on that point the court expressed no opinion, because in the actual case, actual necessity required only the destruction of infected horses, and that was all the legislature purported to authorize. His opinion was indicated, however, by the observation that

"had the statute declared in plain terms, that such healthy animals as should be killed by mistake for diseased ones would not be paid for, we should deem it a serious question whether such provision could be upheld."

[30] 152 Mass. 540 (1891).

Any possible dispute must be considered settled since the declaration of the Supreme Court that the statutes vesting power summarily to destroy food without giving the owner a chance to be heard as to its condition can be sustained only because the determination of the officials and the action taken thereon does not bind the owner as to the quality of the article destroyed, and that it remains open for him in a subsequent suit against the officials to introduce evidence of the actual condition of the food.[31]

It may therefore be taken as established that not even a statutory prohibition of judicial review would preclude the courts from examining the correctness of administrative findings in *ex parte* proceedings, where condemnation is followed by immediate and summary destruction.

But judicial censorship is applied with less severity to determinations resulting only in some temporary restraint of personal liberty or some minor interference with property. An officer is not liable in damages for removing a person afflicted with leprosy to a pest-house, although such action exceeds the necessities of the situation and would be enjoined.[32] It seems also that there would be no liability for removing one to a pest-house where the symptoms were not in fact those of a contagious disease. In Brown *v.* Purdy [33] it is said *obiter:*

"If there was any case for his judgment, or any fact of appearance or symptom as to which a question of small-pox or not could arise, his determination was final as to the legality or propriety of removal."

And in two recent cases, officers who confined to their homes and quarantined persons erroneously assumed to be afflicted with a contagious disease were held not personally liable in damages.[34] In the New Jersey decision there was invasion of property rights as well as of personal liberty, for the plaintiff complained of fumigation as well as restraint.

In Miller *v.* Horton the minority argued from an earlier decision which held that the legislature might order all imported rags to be disinfected, not because all were infected, but because the

[31] North American Cold Storage Co. *v.* Chicago, 211 U. S. 306 (1908). See 24 HARV L. REV. 336. [32] Kirk *v.* Wyman, 83 S. C. 372 (1909), *semble.*

[33] 8 N. Y. St. Reporter 143 (1886).

[34] Beeks *v.* Dickinson County *et al.*, 131 Iowa 244 (1906); Valentine *v.* Englewood, 76 N. J. L. 509 (1908), *infra*, p. 454.

danger was too great to permit of discrimination,[35] that it could make a similar order with respect to the killing of all horses which a respectable board should deem to be so infected. Judge Holmes answered by suggesting that there was an important distinction in degree at least, between regulating the precautions necessary to be taken in keeping property, and in ordering its destruction. And he had previously observed that difference of degree is one of the distinctions by which the right to exercise police power is determined.[36]

In other exercises of governmental power affecting property, the only administrative findings in *ex parte* proceedings held not subject to review are those adjudged to relate, not to the taking of property, but to the granting or denial of some privilege completely within the power of the government to confer or to withhold.[37] And in such instances there is usually opportunity to question the administrative decision in the courts and obtain relief on such other grounds as may be open, before the official action has produced irreparable injury.

(b) *After a hearing.* — When the owner cannot offer his evidence before the administration, he may offer it in the courts. Somewhere there must be a hearing. Frequently the administration grants a hearing. But the owner who is dissatisfied with its conclusions from the evidence presented may prefer to submit the evidence to court and jury.

Most statutes which permit summary execution without first giving the owner an opportunity to take action himself, provide also that the administrative decision may be reached upon inspection without hearing testimony. For the necessity which prohibits postponement of execution after action has been determined upon, will usually forbid the delay involved in granting a hearing before reaching a decision. Conversely, the statutes which require a hearing before reaching a conclusion usually permit administrative execution only in default of action by the owner. So that the decisions in suits for damages which have been assumed to deny the right of judicial review of conclusions of fact reached by an

[35] Train *v.* Boston Disinfecting Co., 144 Mass. 523 (1887).

[36] Rideout *v.* Knox, 148 Mass. 368 (1889).

[37] Buttfield *v.* Stranahan, 192 U. S. 470 (1904); Public Clearing House *v.* Coyne, 194 U. S. 497 (1904).

administrative body after a hearing are instances where notice to abate preceded the abatement of the administration.

This point, however, has not been noted by the courts; and some of the principles declared are broad enough to apply to administrative decisions executed without notice. With respect to *ex parte* determinations, the doctrine is clearly opposed to the overwhelming weight of authority. It remains to be inquired whether it obtains with respect to determinations reached after a hearing.

Van Wormer *v.* The Mayor [38] was not decided by the court of last resort, and the opinion cites no authorities. Its declaration that in an action of trespass evidence to show there was in fact no nuisance was properly rejected, must compete with a *dictum* of the Court of Appeals some sixty years later to the effect that "no decision of a board of health, *even if made on a hearing*, can conclude the owner upon the question of nuisance." [39]

In Raymond *v.* Fish [40] the court propounded this question:

"Does the statute confer upon the board of health the right to determine conclusively in any case what are nuisances and sources of filth which endanger the health of the inhabitants, so that if they act in good faith and merely err in judgment, the statute will justify the act done although the property of a third party may be destroyed?"

The affirmative answer is deduced by the reasoning that since any private citizen may abate what is in fact a nuisance which does him harm, if the statute gives the officers no additional protection it accomplishes nothing by its enactment. It was held, therefore, that the statute meant to give the board power to decide the matter conclusively in the apparent necessities of the case.[41] But the immunity accorded by the decision was confined to "seemingly extreme cases," where there is "reasonable ground to believe that immediate action is necessary" and "reasonable ground to believe the supposed nuisance to be one in fact."

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[38] *Supra*, p. 445.

[39] Health Department *v.* Trinity Church, 145 N. Y. 32 (1895). See 24 HARV. L. REV. 334.

[40] *Supra*, p. 445.

[41] "The statute does not mean to destroy property which is not in fact a nuisance, but who shall decide whether it is so? All legal investigations require time and cannot be thought of. If the board of health are to decide at their peril, they will not decide at all. . . . It would seem absolutely necessary to confer upon some constituted body the power to decide the matter conclusively, and to do it summarily, in order to accomplish the object the statute had in view. We think this has been done."

The decision does not purport to be based on the fact that a hearing was given. The discussion throughout the opinion is equally applicable to summary destruction without prior hearing. The positions taken seem squarely opposed to those advanced by the majority in Miller *v.* Horton.[42] The decisions are to be distinguished by the fact that in Raymond *v.* Fish the administrative execution was preceded by notice, rather than that before reaching the determination on which the execution was based a hearing was there accorded which was absent in Miller *v.* Horton. For the only hearing in Raymond *v.* Fish was on July 16 with respect to an order issued on August 15, and rescinded on August 24. On December 8 the board took up the matter again and voted to require owners to remove their brush before December 25. But plaintiff had no notice of this contemplated action and no knowledge of it until four days after it was taken. After September 1 the malady ceased to be epidemic; so that the owner, if granted a hearing as to the issue of the second order, would doubtless have urged other considerations than those presented five months previously. In Miller *v.* Horton the plaintiff knew of the examination of his horses, and notified those who came to kill them that surgeons employed by him had found no trace of glanders or other disease; whereupon action was postponed until after further consultation with the commissioners. But in that case the court looked not at what was actually done, but at what would have been permitted under the statute. So far as appears from such portions of the statute as are set forth in the opinion of Raymond *v.* Fish, the board, though required to notify the owner to abate within some time set, was not obliged to give him any opportunity to be heard before the issue of the order. In assessing property for taxation, a hearing must be given not as a matter of grace or favor, but must be a right secured by the statute.[43]

[42] *Supra*, p. 448.

[43] Stuart *v.* Palmer, 74 N. Y. 183 (1873). This case is cited in a *dictum* in People *v.* Board of Health, 142 N. Y. 1 (1893), to show that the same rule applies to exercises of the police power. The court observes that before a final and conclusive determination could be made as to the existence of a nuisance, "the party proceeded against must have a hearing not as a matter of favor, but as a matter of right, and the right to a hearing must be found in the act." The intimation that under such circumstances the administrative *fiat* could not be questioned, contrasts strangely with another observation in the same opinion to the effect that "if the decisions of these boards were final and conclusive, *even after a hearing*, the citizen would in many cases

The only authority cited in Raymond *v.* Fish for the point decided is a *dictum* in Salem *v.* Eastern R. R. Co.,[44] which suggested that though the determination is not conclusive in an action against the owner for the expense of abatement, the board to whom the determination was confided are protected by it and may safely rely upon its validity for their defense. But that case related to the alteration and improvement of property, not to its destruction; the statute under which the board acted made no provision for notice and hearing; and in Miller *v.* Horton, a later decision of the same court, the *dictum* was expressly disapproved.[45]

In Raymond *v.* Fish the constitutionality of the interpretation put upon the statute is asserted rather than discussed. In speaking of the common-law right of one assailed to kill in self-defense, though the apparent necessity is not an actual one, the court queries:

"If life may be protected by destroying life, when apparently necessary but not so in fact, may not life be protected by destroying property when apparently necessary though afterwards discovered not so in fact?"

This analogy seems hardly apposite. No health officer is put on trial for his life for murdering a horse or for destroying brush. The apparent necessity which in prosecutions for homicide relieves the slayer from criminal responsibility might not be deemed sufficient to excuse him from paying damages to the estate of the deceased for his error of judgment.

The reasoning employed in Beeks *v.* Dickinson County *et al.*,[46] which held a health officer immune from liability for having quarantined a person not in fact infected with a contagious disease, is likewise unsatisfactory. The court says:

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hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated and generally unfitted to discharge grave judicial functions." See 24 HARV. L. REV. 340.

[44] 98 Mass. 431 (1868).

[45] Judge Holmes says: "The remark is *obiter*, and it is doubtful perhaps, on reading the whole case, whether it means that the determination would protect them in an action for damages, where the statute provides no compensation for property taken which is not in fact a nuisance. To give it such effect as a judgment merely would be inconsistent with the point decided and with Brigham *v.* Fayerweather, 140 Mass. 11."

[46] 131 Iowa 244 (1906), *supra*, p. 449.

"It is the modern tendency of judicial opinion to hold that the public health is the highest law of the land. . . . This board of health was the creation of the statute and its paramount duty was to protect the public health; its duty then, was to the public and not to any individual member thereof, except to act honestly and without design to injure him. If a health officer fails to do his duty, no individual may complain, for the duty is public and the officer is not charged with any individual duty to any particular person. If there be no liability for an omission of public duty, it would seem to follow without question that an erroneous performance should not subject the officer to personal liability. It may, it is true, cause an injury to the individual, but it is not a wrong because the officer owes the individual no duty beyond what we have already stated." [47]

But the court blinds its eyes to the wide distinction between the absence of a positive duty to an individual with respect to some service that may be claimed only by the public, and the absence of the negative duty owed to all individuals by all individuals, whether private citizens or officers, not to invade legally protected rights.

But though present authority may not sustain the proposition that finality is to be accorded to administrative decisions whether certain property is obnoxious to the police power, the courts are tending towards sustaining legislative declarations to that effect.

In Valentine *v.* Englewood [48] the statute, as quoted in the opinion, provided that "no suits should be maintained against the board or its agents to recover damages for proceedings to abate and remove a cause of disease, unless it should be shown that the cause of disease did not exist, was not hazardous or prejudicial to the public health, and that the board acted without reasonable and probable cause to believe that such cause was in fact prejudicial and haz-

[47] The opinion puts strongly the argument of public necessity: "It is unfortunate that any individual should suffer loss because of a mistake as to the existence of a dangerous disease, and yet the welfare of the public is of such paramount importance that a rule should not be established which will have the necessary effect of increasing the public danger. If health officers, acting in perfect good faith and as their judgment dictates, are held liable for a mistake in judgment, the effect upon the public health cannot be doubted. . . . If civil liability is to be imposed because of a quarantine which is later proved unnecessary, the danger to the public will be greatly enhanced, and the effectiveness of the statute greatly impaired. We do not feel like announcing such a rule, nor do we believe justice to the individual requires it."

[48] 76 N. J. L. 509 (1908).

ardous to the public health." The language is susceptible of two interpretations. It might be argued that it indicates a distinction between the existence of a source of disease and the possibility of hazard from such source. A swamp with typhoid germs might be deemed a source of disease, and yet be so situated that it was not in fact hazardous. It would follow, then, that since the statute relates reasonable cause, not to the belief in the existence of the source of disease, but to the belief in the possibility of hazard, it means to allow suit even where a source of disease exists, if the plaintiff can establish "that the board acted without reasonable and probable cause to believe such cause was in fact prejudicial and hazardous to the public health." On the other hand, it may be urged that since the purpose of the statute was to limit, not to vest a right of action, and its language in specifying exceptions to the limitation on the right to sue is cumulative and not in the alternative, that it means to condition the right of the plaintiff not only on showing that no source of disease existed, but on establishing further that the board had no reasonable grounds to believe that the alleged source was in fact hazardous. Where the alleged source, if it existed, was necessarily hazardous, this would require him to show the absence of reasonable grounds for believing that the alleged source was one in fact.

In the case before the court, if any cause of disease existed, it was necessarily hazardous. Damages were sought for quarantining the plaintiff on the mistaken assumption that his daughter had scarlet fever. The trial judge had nonsuited the plaintiff, and the higher court conceded that his ruling could not be vindicated if the actual existence of the disease was essential to the justification of the defendants. The issue joined upon the pleadings was only whether there was reasonable and probable cause to believe that the symptoms were those of the disease, but the court said: "It would be taking too narrow a view of the case to decide it upon this question of pleading only. We prefer to rest the decision on broader grounds." Without analysis the statute was interpreted as follows:

"What our legislature has done in the Health Act is in substance to say that anything which may possibly be a cause of disease is subject to the regulations of the board of health, when that board has reasonable cause to believe that it is in fact a cause of disease. . . . The legislature has

itself undertaken in effect to make a nuisance of what the board of health shall, upon reasonable and probable cause, determine to be a cause of disease."

The statute thus construed was held to distinguish the case at bar from Miller *v.* Horton,[49] Lowe *v.* Conroy,[50] and Pearson *v.* Zehr.[51] Its constitutionality was sustained on the analogy of Train *v.* Boston Disinfecting Co.,[52] and the general principles of public welfare and necessity. After referring to decisions sustaining statutes requiring an eight-hour law for laborers, compelling vaccination, and declaring places where liquors are sold to be nuisances, the opinion says:

"These cases are but illustrations of the extent to which the highest tribunal has gone in vindication of the principle that the individual must yield somewhat of his personal rights to society in return for the benefits of society which he enjoys. We think it not unreasonable to require him in a case like the present to depend for redress upon the sense of justice of the public, rather than upon the right of action against public officers who have acted, as they thought, for the public weal in a matter of public duty."

Though the court distinguishes the case at bar from Miller *v.* Horton [53] by reason of the statute, it disagrees with the doctrine of the Massachusetts court that in the absence of any statute the board has no jurisdiction unless a cause of disease actually exists. It is said to be enough if the matter is colorably, though not really within their jurisdiction. With telling force Judge Swayze points out that Miller *v.* Horton and similar cases cannot be distinguished on the ground of excess of jurisdiction from the many instances in other exercises of governmental power, where administrative officials are held exempt from suit when called upon to act judicially.

"If a postmaster-general, or a postmaster or a collector of a port, or an assessor of taxes are to be immune when their error of judgment causes the loss of another's liberty or property, we think a board of health is entitled to a like immunity. A justice of the peace is immune if he acts in a matter colorably within his jurisdiction. The underlying reason is not the judicial character of the officer, but the judicial character of the act, and the public necessity that public agents engaged in

[49] *Supra*, p. 448. [50] *Supra*, p. 447. [51] *Supra*, p. 447.
[52] *Supra*, p. 450. [53] *Supra*, p. 448.

the performance of a public duty in obedience to the command of a statute, should not suffer personally for an error of judgment which the wisest and most circumspect cannot avoid."

It seems clear from the discussion in the opinion that the court would not have decided differently, had there been no statute limiting the right of action. For, in the endeavor to establish that the statute authorizing summary procedure and yet conferring immunity proffers due process of law under the Fourteenth Amendment, it says that due process does not always require notice and a hearing, and adds:

"Where the board of health is required to act upon an emergency, due process of law requires only that they should be liable to an action in case they act wrongfully; but the action to which they are liable is only such action as the law gives. In this case, the common law, as we have already shown, gave no right of action if the matter upon which the board decided was colorably within its jurisdiction. The object of the Fourteenth Amendment was not to give the parties remedies which did not exist at common law, but to protect them against hostile action by the state depriving them of existing remedies."

It seems to smack somewhat of casuistry to say that a statute purporting to limit a right of action does not do so, but merely enlarges the jurisdiction of an officer, and in another part of the opinion to insist that the statute limiting the right of action distinguishes the case at bar from the precedents where no such statute was present.

Though the plaintiff in Valentine *v.* Englewood, as in Miller *v.* Horton, had been permitted to present the opinions of experts called by him before the board took its action, this was a matter of favor and not of right; and the court regards the action taken as though no hearing had been accorded. From this aspect it is hardly sound in saying that the statement of the Supreme Court that whether assessors shall be held liable for an unlawful assessment if within their jurisdiction is a matter of general municipal law and raises no federal question, is an authority for the proposition that a statute authorizing such exemption in a case like the one at bar does not contravene the Fourteenth Amendment. For the Supreme Court has indicated very clearly that a statute authorizing the summary destruction of property as a police measure

would be invalid under the Fourteenth Amendment, but for the fact that the owner could have a judicial determination as to its condition in an action for damages against the officer.[54] The statute in the present case can escape from the principle of that decision only because the invasion of liberty and property is temporary and inconsequential when compared with the public danger to be averted.

The opinion in Valentine *v.* Englewood, though given in a case involving only slight interference with property and personal liberty, where the consequences of excess of caution would be far more serious than those of excess of zeal, clearly points the way to an extension of the immunity hitherto accorded to administrative officials in taking measures to safeguard the public health. The advancing trend of judicial opinion is gradually forsaking the individualistic doctrines underlying the precedents of an earlier generation, and demonstrating the truth of the maxim of Mr. Justice Holmes in his lectures on The Common Law that the "life of the law is not logic but experience," or affording illustration for the tenets of that school of philosophy which urges that the only sound logic is the logic of experience.

The decrees of the courts, however, still lag behind the utterances of the opinions. The immunity of officials for acts done in enforcing the police power cannot yet be said to be established except where the interference is with personal liberty rather than with property, or where the interference with property falls short of destruction, or is not executed until the individual has been given an opportunity to take action himself and thus enabled by prompt action to secure judicial relief in some other proceeding. But it may reasonably be expected that the immunity will some day be extended to cases where the individual has been able as a matter of right to urge before the administration his claims to freedom from interference. At present, however, the courts seem still convinced that when property is destroyed in the exercise of the police power the owner must have somewhere in judicial proceedings the opportunity to offer evidence as to its condition. The Chancellor and the jury are regarded as best suited to determine finally the disputed question of fact. And thus indirectly the community is being forced to assume the burden of loss,[55] thereby relieving

[54] North American Cold Storage Co. *v.* Chicago, 211 U. S. 306 (1908), *supra*, p. 449.

[55] See *supra*, p. 447, note 29.

both the owners who are without fault and the administrative authorities who may make mistakes in the honest endeavor to perform the duties entrusted to them by law. The same solution of the vexed problem is suggested by the courts in the instances where the burden is now placed on the owner rather than on the administrative official.[56]

Judge Holmes, in Miller *v.* Horton, doubted the constitutionality of a statute which should "declare in plain terms, that such healthy animals as should be killed by mistake for diseased ones, should not be paid for." Probably no statute would announce bluntly that an officer should not be liable for destroying property erroneously declared injurious, even after a hearing. But in some such language as that employed by the statute in Valentine *v.* Englewood it might accord finality to the determination of an expert body, in spite of the contrary finding of twelve other men who composed the jury in a suit for damages.

Much confusion is due to the nebulous purport of the word *fact.* Judicial interpretation invariably identifies it with something determined to be true in judicial proceedings. A contrary notion sometimes prevails among those who suffer from the findings of blundering juries. The truth in these matters is not capable of absolute mathematical demonstration. We must accept as final the opinion of some designated fallible human beings. A jury is as prone to error as an expert body.

In other exercises of governmental power, finality is accorded to administrative determinations based on the consideration of evidence submitted by those whose interests are involved. A tax paid on property actually worth twenty thousand dollars but erroneously valued at twice that amount cannot be recovered. The loss may be greater than the value of a horse or a steer. It is thought that the welfare of collective society is promoted by vesting the power of final decision in administrative officials. The rule may come in time to be applied to the exercise of the police power, whenever the courts conclude that this collective advantage outweighs the possible injury to individuals who insist that the administration has acted erroneously.

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[56] *Supra*, p. 456.